IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-618

CLEM MARTIN, ET AL, *Petitioners*

v.

CONTINENTAL GRAIN COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals, Fifth Circuit
New Orleans, Louisiana

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To the United States Court of Appeals, Fifth Circuit
New Orleans, Louisiana

To The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

CLEM MARTIN, MELVIN MARTIN and MARTIN BROTHERS AND SON, Petitioners herein, pray that a writ of certiorari be issued to review the final decree of the United States Court of Appeals, Fifth Circuit, affirming the judgment of a trial court based on findings of fact made by the trial judge without the aid of a jury, in a diversity of citizenship case, in favor of Respondent.

I. STATEMENT OF THE MATTER INVOLVED

1. The United States Court of Appeals rendered a decision in this case on August 4, 1976, sustaining the

judgment of the trial court, holding that Petitioners, first year soy bean farmers, were "Merchants" as that term is defined in The Texas Uniform Commercial Code, when marketing their farm products. Petitioners' Motion for Rehearing was overruled on September 15, 1976. The opinion of the Fifth Circuit, copy appended as APPENDIX A, is unreported as of this date.

2. This case was submitted on oral argument to the Fifth Circuit on April 14, 1976.

After submission of this case, on April 23, 1976, the case of *Nelson v. Union Equity Co-operative Exchange,* 536 S.W.2d 635, (Tex. Civ. App.), was decided by the Fort Worth Court of Civil Appeals, a Texas intermediate appellate court. In *Nelson,* the intermediate court held that the farmer (Nelson) was a merchant within the meaning of that term as defined in the Texas Uniform Commercial Code. The *Nelson* decision was called to the attention of the Fifth Circuit and on August 4, 1976, the Fifth Circuit rendered a decision in this case following the rule announced in *Nelson.*

Petitioners timely filed Motion for Rehearing in the Fifth Circuit, pointing out that Nelson had filed Application for Writ of Error in the Supreme Court of Texas on June 30, 1976, and that a decision on such application was pending.

Petitioners' Motion for Rehearing was overruled by the Fifth Circuit on September 15, 1976.

The Supreme Court of Texas granted Nelson's Application for Writ of Error on October 2, 1976, among others, on the following point:

> Point No. 4—The Court of civil appeals erred in holding that there is evidence of probative force to support the finding of the trial court that Petitioner was a merchant as that term is defined in 2.104 of the Texas Business and Commerce Code.

The *Nelson* case is now set for submission on oral argument in The Supreme Court of Texas on November 19, 1976.

Thus, if the Supreme Court of Texas, having granted Application for Writ of Error in *Nelson,* should reverse the opinion of the intermediate court that was followed by the Fifth Circuit, Petitioners will have been the victim of the application of an erroneous rule of law by the Fifth Circuit and without remedy unless this application is granted.

3. Respondent's suit arose out of a claim by Respondent that: Petitioner on August 22, 1970, sold Respondent 10,000 bushels of soy beans at $3.30 per bushel for delivery in October, 1972 or $3.33 per bushel for delivery in November, 1972; that Petitioners failed to deliver the soy beans; that Respondent purchased on the open market a like quantity of soy beans at a reasonable market price that resulted in a differential loss to Respondent of $28,325.00, for which amount Respondent prayed judgment of the Court, together with interest and attorneys fees. Respondent did not allege any payment or other performance.

Petitioners' Motion for Change of Venue to Southern District of Texas or Dismissal was denied.

Petitioners' Answer denies selling soy beans to Respondent; states that Petitioners are farmers and have no other business or profession; *that they have never dealt*

as merchants in the business of buying and selling soy beans, grain or other goods or farm products; that the soy beans claimed to have been sold were, on the alleged sale date, a growing crop, attached to the realty, in an unmanufactured state and were therefore farm products; that Petitioners have never signed any writing of any nature between Respondent and Petitioners; Petitioners affirmatively pleading the Statute of Frauds relating to personal property as set forth in Section 2.201 of Vernon's Texas Codes Annotated, Business and Commerce as a bar to Respondent's recovery.

4. Respondent's proof came basically from its witnesses Tex Potter, a fertilizer salesman (R. 587), who had no prior experience in booking soy beans (R. 589), and Georgia Leone Williams, a grain buyer for Respondent.

Potter testified that on August 22, 1972, he had called on Petitioner, Clem Martin, in his bean field, to check his beans for "pod sets" and "insects" (R. 587-588). A discussion was had between Potter and Clem Martin in regard to "booking" 10,000 bushels of soy beans (then growing in the field) for future delivery (R. 589-590). Potter accompanied Clem Martin to his barn, where at the suggestion of Potter, a telephone call was placed from the telephone in Clem Martin's barn, to Continental Grain Company in Beaumont (R. 590), at which time Potter had a telephone conversation with Georgia Leone (now Williams), an employee of Respondent. Potter told Leone that he had *a first year bean grower* who wanted to book some beans (R. 591). Potter asked Leone to book the beans and send a confirmation (R. 593). Upon receipt of the confirmation Clem Martin called Potter and he came down and reviewed the confirmation (R.

594). Clem Martin was complaining because the confirmation was made out "to Clem Martin and it should have been Martin Bros. & Son in care of Clem Martin . . ."; and there was no way he could get those beans out and dried in November. Martin asked that Potter call back and get the name changed to "Martin Bros. & Son, in care of Clem Martin, and a December-January delivery date inserted". Potter called Continental and again talked to Leone (R. 595); calling from Martin's barn to Beaumont, Texas. Leone told him the price was $3.33; ". . . and I talked to Miss Georgia and she said she would change the wording at the top to Martin Bros. & Son, in care of Clem Martin . . ."; (R. 596); Potter knew that prior to 1972 Clem Martin had not been involved in raising soybeans, or buying and selling soybeans; to his personal knowledge the Plaintiffs are, in fact, farmers (R. 605). Clem Martin is a working-type farmer as distinguished from a manager-type farmer; he rides a tractor from before daylight until after dark; he is an uneducated "dirt farmer". This was Martin's first year to raise soybeans and he didn't know what variety of seed to get, so Potter called his contact in Louisiana (R. 607). Potter had never been engaged in buying and selling soybeans (R. 608).

Respondent witness, Georgia Leone (Williams), testified that in August, 1972, she had worked for Continental Grain two years; primarily as a soybean broker. At the time of the trial she was a commodity broker. She did receive a telephone call from Tex Potter on August 22, 1972 (R. 577). He identified himself as a fertilizer dealer; calling for a farmer to sell his beans for him. She was told Martin was hard of hearing; she was asked the price of beans and quoted the price for October-November

delivery (R. 578). She explained the contract date; the delivery date, the price of $3.30 for 10,000 bushels, the contract number and specifications meaning the grade specifications; (R. 579). She told Potter a contract would be sent which she did (R. 580). Respondent's Exhibit 16 is the contract she sent (R. 582). She received another call from Mr. Potter (R. 584), two days later (R. 585). Potter called and told her they would like to have a couple of changes in the contract (R. 638); he wanted the delivery date changed to December-January to which she agreed (R. 639). The contract confirmation that was sent to Mr. Martin had a place on it for the customer's signature (R. 673). The first part of January a man representing Mr. Martin called Leone (R. 672) and told her he (Martin) did not think the contract was valid, she is sure it was the first part of January (R. 678). She made a memoranda of the conversation (R. 679); the party making the call was disaffirming the contract (R. 680).

II. JURISDICTION

1. This appeal is from the opinion of the United States Court of Appeals, Fifth Circuit, rendered August 4, 1976, a copy of which is hereto appended as APPENDIX A.

2. Petitioners' Motion for Rehearing was denied, September 15, 1976, as shown by copy of Order appended as APPENDIX B.

3. Jurisdiction to grant this Petition is sustained by Title 28, U.S.C.A., Section 1254, sub-section (1). (June 25, 1948, c. 646, 62 Stat. 928).

III. QUESTION PRESENTED

The question presented is whether the United States Court of Appeals, Fifth Circuit, in a diversity case, has correctly applied the substantive law of Texas in holding the Petitioners, who are first year soy bean farmers, are "Merchants" under the Texas Uniform Commercial Code,[1] in regard to the marketing of their farm products, and therefore stripped of the defense they would otherwise be afforded under the Statute of Fraud Section of the Uniform Commercial Code, in regard to an alleged contract which Petitioner did not sign.

IV. REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Court of Appeals stated that:

"We find no Texas Statute or decision of the Supreme Court of Texas which furnished the guide to the questions."

(1) Vernon's Texas Codes Annotated, Business and Commerce, Section 2.201[2], as aided by Section 2.104[3], is the only necessary guide and provides the statutory substantive law of Texas, which must be followed in a diversity case. The statute does not enlarge the definition of merchant to include farmers selling their farm products.

(2) Writ of error has been *granted* by the Supreme Court of Texas, to review the decision of the intermediate court, in the case of *Nelson v. Union*

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1. Vernon's Texas Codes Annotated, Business and Commerce, Sections 2.201 and 2.104.

2. Text attached as APPENDIX E.

3. Text attached as APPENDIX F.

Equity Co-operative Exchange, 536 S.W.2d 635, which decision the Fifth Circuit relied upon and applied as the law in Texas.

(3) A reversal of the *Nelson* decision by the Supreme Court of Texas will leave Petitioners the victim of an erroneous application of the law of Texas by the Fifth Circuit and without recourse to correct such error unless this writ is granted.

V. ARGUMENT AMPLIFYING REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Texas granted Writ of Error in the *Nelson* case on October 2, 1976[4]. The writ was granted on two points. The sustaining of either point would require a reversal of the intermediate Appellate Court and leave Petitioners here without procedure for proper application of Texas substantive law to this case unless this writ is granted.

Nelson v. Union Equity Co-operative Exchange, 536 S.W.2d 635 (Tex. Civ. App.), rehearing denied on May 21, 1976, writ of error granted by Supreme Court of Texas on October 2, 1976, and cited by the Fifth Circuit, is not authority for holding that Petitioners are Merchants as to the transaction involved here.

The *Nelson* opinion does not detail the knowledge or experience of Nelson in relation to "forward contracts" dealing with the particular commodity. However, all of the cases reviewed by the *Nelson* opinion do detail knowledge and experience in "forward' sales as a basis for the holding, in each instance where the farmer is held to

4. See APPENDIX C, for the full text of the order of the Supreme Court of Texas granting the Writ: *The Texas Supreme Court Journal,* Vol. 19, No. 44 of October 2, 1976.

be a Merchant in regard to the particular commodity. No case cited by *Nelson,* (or elsewhere) has held that a farmer completely inexperienced in "forward" contracts is a merchant when marketing his farm products.

This case is an exceptional case. The undisputed facts set it apart from any other reported case on the subject. The Court should be aware that there is *no evidence* the Petitioners had ever participated in a "forward sale" of *any commodity* of any kind. All prior sales by Petitioners of their farm products have been consummated by Petitioners delivering *samples of the harvested crop* to the prospective buyer, the buyer submitted a bid which, if accepted by Petitioners, was followed by delivery and payment. These facts are undisputed. They form *no basis* for the Trial Court's conclusion. Therefore there is *no evidence* upon which the Trial Court could base its conclusion that Petitioners were "Merchants" in regard to the marketing of their first crop of soy beans.

A careful analysis of the reported cases on the subject,[5] *fails to reveal a single case* where the Appellate Courts have held that a *first* effort at negotiation of a "forward" or "futures" contract by a farmer, or his farm products,

5. *Sierens v. Clausen,* 328 N.E.2d 559, Ill. Sup. Ct. the farmer had sold his crop to grain elevators both in "cash sales" and "future contracts" for a period of at least *five years.* Case Remanded.

Continental Grain Co. v. Ralph Brown, et al, 74-C-303, District Court, Western District of Wisconsin, the farmer had previously sold 20,000 bushels of corn in January, 1974; 25,000 bushels in July, 1974, both sales for future delivery. Summary Judgment denied.

Loeb and Company, Inc. v. Schriener, -Ala-, Alabama Sup. Ct., 1975, holding that an astute farmer selling his own products is not a "dealer" in goods.

Cook Grains, Inc. v. Fallis, 395 S.W.2d 555, (Ark. Sup. Ct. 1965) the Arkansas Supreme Court held that facts very similar to the facts involved in this case did not create a "scintilla" of evidence that the farmer was a merchant.

was sufficient to pin a "Merchant" label on a farmer. It is respectfully suggested that the Fifth Circuit is not only in error but is depriving farmers as a class of the benefit of the Statute of Frauds relating to personal property which the Texas Legislature did not intend that Texas farmers be deprived.

VI. CONCLUSION

Jurisdiction here is through diversity. The rule of *Erie* applies.[6] Texas Courts have not construed Section 2.104 of the Code relating to the definition of the term "Merchant", prior to the decision in *Nelson*. As noted the *Nelson* decision is by the Fort Worth Court of Civil Appeals. Application for Writ of Error by Nelson to the Supreme Court of Texas has been granted.[7] Petitioners here are in a position of having their rights determined on the basis of an intermediate State Court decision that is not final (and that is now under review by the highest state court) and which might well be reversed or modified by the Supreme Court of Texas. Whether the *Nelson* decision is reversed, modified or affirmed, the present holding in that case should not be controlling here for the reasons above stated.

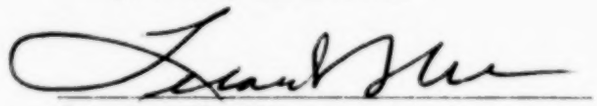
Wherefore, Petitioners pray that this Application be granted and that the opinion rendered by the United States Court of Appeals, Fifth Circuit, on August 8, 1976, Rehearing denied September 15, 1976, be set aside

6. *Erie Railroad Co. v. Tomkins*, 340 U.S. 64, 585 S.Ct. 817.

7. See excerpt from *Texas Supreme Court Journal*, Volume 19, Page 44, of October 2, 1976, reproduced as APPENDIX C hereto.

and that the judgment of the Trial Court be reversed and rendered and that Respondent take nothing by this suit.

Respectfully submitted,



LELAND B. KEE
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Post Office Box 700
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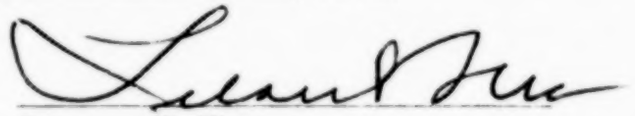
CERTIFICATE OF SERVICE

Copies of the Petition for Writ of Certiorari, have been mailed by certified mail, postage prepaid, to Messrs. Benckenstein, McNicholas, Ball, Oxford, Radford and Johnson, P. O. Box 150, Beaumont, Texas 77704, on this 29th day of October, 1976.



LELAND B. KEE

APPENDIX

APPENDIX A

CONTINENTAL GRAIN COMPANY,
Plaintiff-Appellee,

v.

Clem MARTIN and Clem Martin, Individually and d/b/a Martin Brothers & Son, Defendants-Appellants.

No. 75-1324.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Aug. 4, 1976.

Buyer brought action against sellers for breach of contract to sell soybeans. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, rendered judgment for buyer and sellers appealed. The Court of Appeals, Jones, Circuit Judge, held that evidence supported finding that there was a meeting of the minds between the parties and that sellers who refused to deliver soybeans after the price rose were merchants and not entitled to shield themselves from liability by the statute of frauds.

Affirmed.

* * *

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, Chief Judge, JONES and GOLDBERG, Circuit Judges.

JONES, Circuit Judge:

This is a diversity action arising in Texas and governed by the laws of Texas. Continental Grain Company negotiated with the Martins, a partnership, for the purchase of 10,000 bushels of soybeans at a price of $3.33 per bushel. Subsequently the Martins informed Continental that delivery would not be made. The market price for soybeans had risen to $5.13½ per bushel. Continental sued for breach of contract. The district court, without a jury, rendered judgment for Continental. The Martins have appealed.

[1] Although other questions are raised by the Martins, their principal contentions are twofold. It is urged, first, that there was no contract between the parties, and recond, that recovery is precluded by the Statute of Frauds provision of the Texas Uniform Commercial Code. The question as to whether there was a meeting of the minds between the parties to this litigation is basically a fact issue. The issue was resolved by the district court and its finding that there was an agreement is amply supported by the evidence.

The negotiations were conducted by telephone, and the oral agreement was at first for 10,000 bushels at $3.30 per bushel for October-November, 1972, delivery. Continental sent a written contract form to the Martins. A subsequent telephone call changed the price to $3.33 per bushel and the delivery date to the following December-January. Continental sent the Martins a written form of agreement to effect the change. Neither of the agreements was signed by the Martins. A telephoned agreement extending the delivery date was followed by a written confirmation from Continental to the Martins. Early in Feb-

ruary Continental received a letter from an attorney for the Martins which repudiated the agreement. Continental sued. The district court found, among other things, that the Martins were merchants. It rendered judgment against them for $18,050, the difference between the contract price and the market price on the last agreed delivery late.

That part of the Statute of Frauds provision of the Texas Uniform Commercial Code which is pertinent here is in these terms:

> "(a) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> (b) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received." Vernon's Texas Code Annotated, Business and Commerce, Section 2.201 (1967).

[2] The crucial question on this appeal is whether, as the district court found, the Martins were merchants within the meaning of the statute at the time they agreed with Continental. If they were not, they win; if they

were, they lose. The jurisdiction being based on diversity, the Erie doctrine requires that the law of the state fixes the rule of decision.

[3, 4] We find no Texas statute or decision of the Supreme Court of Texas which furnishes the guide to the question. Absent such a guide we follow the rule announced and applied by an intermediate appellate court of the state. Wright, Federal Courts 2d 236 § 58. The Court of Civil Appeals for the Second Supreme Judicial District of Texas in the case of *Nelson v. Union Equity Co-operative Exchange*, 536 S.W.2d 635, Decided April 28, 1976, announced the rule which is decisive of the principle question presented here. The Texas Court said:

> "Every good reason exists for holding that the fact finder should be entitled to determine the question. In most instances where an ignorant, innocent, and inexperienced farmer fails to consummate a contract of the kind under consideration he will probably be protected by the finding made. In most instances where a knowledgeable and experienced trader who happens to be a farmer fails to consummate such a contract in order to take advantage of the purchaser, to the resultant loss by the latter in good faith reliance upon the commitment, the purchaser will probably be protected by the fact finder.
>
> Only in the exceptional case would circumstances remove the responsibility for factual determination from the fact finder and require the holding that the farmer was not a merchant as applied to the transaction which is subject of a suit by a purchaser who believes himself protected by the law upon mailing the written confirmation of sale and purchase agreement. That before us on appeal is not such a case. Here the responsibility was devolved upon the

> fact finder. The evidence was sufficient to support the fact finding against Nelson in this case and therefore the judgment must be sustained."

The evidence in the case before us, as in the cited case, was sufficient to support the determination that the Martins were merchants and not permitted to shield themselves from liability by the Statute of Frauds.

The other questions raised need not be discussed. They are without merit.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-1324

CONTINENTAL GRAIN COMPANY,
Plaintiff-Appellee,

versus

CLEM MARTIN & CLEM MARTIN,
Individually and d/b/a MARTIN
BROTHERS & SON,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

(September 15, 1976)

Before BROWN, Chief Judge, JONES and GOLDBERG, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

THE TEXAS SUPREME COURT JOURNAL

* * *

Vol. 19 (Pages 451-464)

OCTOBER 2, 1976 No. 44

COVERING SESSION OF THE SUPREME COURT OF TEXAS

SEPTEMBER 29, 1976

* * *

Nelson v. Union Equity Co-Operative Exchange, No.B-6108 (Opinion of Court of Civil Appeals, 536 S.W.2d 635).

This case involves the definition of a "merchant" under the Texas Business and Commerce Code.

Union Equity Co-Operative Exchange brought this damage against Carroll Nelson and alleged: that the parties orally agreed that Mr. Nelson was to deliver 5,000 bushels of wheat @ $3.56 per bushel; that Union Equity then mailed written confirmation to Mr. Nelson as contemplated by the Uniform Commercial Code, Texas Business and Commerce Code, Section 2.201; but that Mr. Nelson failed to deliver the wheat.

After a non-jury trial, judgment was rendered favoring Union Equity and against Mr. Nelson.

On appeal, the Court of Civil Appeals affirmed, and held that the evidence was sufficient to show that Mr.

Nelson was a "merchant" as that term is defined by Section 2.104 of the Texas Business and Commerce Code.

The Supreme Court grants writ of error with the notation: "Granted on Points 3 and 4."

Point No. 3—The court of civil appeals erred in holding that the evidence was sufficient to support a finding that petitioner was a merchant as that term is defined in §2.104 of the Texas Business and Commerce Code. Such finding was not supported by sufficient evidence as a matter of law.

Point No. 4—The court of civil appeals erred in holding that there is evidence of probative force to support the finding of the trial court that petitioner was a merchant as that term is defined in §2.104 of the Texas Business and Commerce Code.

—Business and Commerce Code

—Merchants

—Buyer and Seller

—Contracts

APPENDIX D

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

APPENDIX E

§ 2.201. Formal Requirements; Statute of Frauds

(a) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(b) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received.

(c) A contract which does not satisfy the requirements of Subsection (a) but which is valid in other respects is enforceable

(1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(2) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(3) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2.606).

(59th Legis., Ch. 721, Sec. 2—201.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

APPENDIX F

§ 2.104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency"

(a) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(b) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2.707).

(c) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. (59th Legis., Ch. 721, Sec. 2—104.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.